No. 89-449 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION,
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Petitioners,

v.

CONSTANCE B. FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED *

1. Should this Court grant certiorari to consider a constitutional challenge to a state statute where the United States Court of Appeals for the Third Circuit has remanded the case for a district court determination of the viability of a potentially dispositive state-law claim?

2. Should this Court grant certiorari to consider a constitutional challenge under the dormant Commerce Clause to a state insurance licensing law that (i) applies a non-affiliation requirement equally to both in-state and out-of-state firms and (ii) the United States Court of Appeals for the Third Circuit finds to have no discriminatory effect on out-of-state interests and no effect on the interstate market for the sale of insurance?

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* Respondents Pennsylvania Association of Independent Insurance Agents and Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc. are corporations. Neither has any parent, subsidiary (except wholly-owned subsidiaries), or affiliate.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Petitioners (collectively "USAA") [1] have been licensed by the Pennsylvania Insurance Department to sell insurance in Pennsylvania. In 1983, USAA became a savings and loan holding company when, through a subsidiary, it obtained a charter for, and began operation of, a federal savings bank in San Antonio, Texas. Because Pennsylvania law prohibits the state Insurance Department from licensing savings and loan holding companies, their affiliates, and affiliates of lending institutions to sell insurance in Pennsylvania, the Insurance Department initiated proceedings to determine whether USAA's eligibility for a Pennsylvania insurance license was jeopardized by this new affiliation.[2]

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[1] The Petitioners, United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company are affiliated, Texas-based insurance companies doing business in, *inter alia*, Pennsylvania.

[2] Section 641 of Pennsylvania's Insurance Department Act of 1921, as amended, P.L. 1148 (1987), codified at 40 Pa. Stat. Ann. § 281 (Purdon Supp. 1987) ("Section 641"), states that "[n]o lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, . . . may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State." Section 641(b). The purpose of this prohibition, announced in Section 641(c), is to "help maintain the separation between lending institutions . . . and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers." All parties below, the district court, and the Third Circuit have referred to the Pennsylvania statute as "Section 641," reflecting the fact that it appears as Section 641 of the Pennsylvania Insurance Department Act. USAA now refers to the statute as "Section 281," reflecting its codification in Pennsylvania Statutes Annotated. These Respondents will continue the practice of referring to the law as Section 641.

In defense of its licenses, USAA urged the Pennsylvania Insurance Department to conclude that Section 641 does not apply to it as either a savings and loan holding company or an affiliate of a lending institution because the USAA savings bank assertedly does not do business in Pennsylvania. Letter from Michael L. Browne to Paul Laskow, Chief Counsel, Legal Division, Pennsylvania Insurance Department (Oct. 29, 1984); *see also* Respondent's Post-Hearing Brief at 18, *In re: United Services Automobile Association, et al.*, Docket No. C84-12-5 (before the Insurance Commissioner of the Commonwealth of Pennsylvania).[3]

USAA's defense raised a statutory question of first-impression before the Insurance Department. But before this state-law issue could be resolved, USAA filed a lawsuit in federal district court on November 27, 1984, seeking declaratory and injunctive relief to prevent the Pennsylvania Insurance Department from enforcing Section 641 against it.

The district court dismissed USAA's complaint in 1985 on abstention grounds, noting, *inter alia*, that there "is clearly an unsettled and potentially dispositive issue of state law" because "[t]he dispute between U.S.A.A. and the Insurance Department has, from the beginning, fo-

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[3] Section 641(a) defines a lending institution to be "any institution that does banking business in Pennsylvania." USAA has "argued that the purpose of [Section 641] is limited to preventing financial institutions doing business in *Pennsylvania* from competing or being affiliated with Pennsylvania insurers; as the Bank is based and does business only in Texas, the section [assertedly] does not apply to USAA." *USAA v. Muir*, 792 F.2d 356, 360 (3d Cir. 1986), *cert. denied sub nom. Grode v. USAA*, 479 U.S. 1031 (1987); Appendix to Petition for Writ of Certiorari ("App.") at 72a (emphasis in original). The factual basis for this assertion has not been established, *see USAA v. Foster*, 874 F.2d 926 (3d Cir. 1989); App. at 16a-17a n.11, and these Respondents do not concede either that the state-law claim has been properly presented or that it is in any respect correct.

cused on the interpretation of § 641. . . ." *USAA v. Muir*, App. at 92a.

In reviewing the district court's dismissal, the Third Circuit observed that "state law is . . . unsettled" on whether Section 641 would require the de-licensing of USAA and that USAA offers a "cogent alternative interpretation" of Section 641 that "might well be adopted" by a reviewing court. *USAA v. Muir*, 792 F.2d 356, 362 (3d Cir. 1986), *cert. denied sub nom. Grode v. USAA*, 479 U.S. 1031 (1987); App. at 76a. The appellate court reversed the abstention ruling and remanded for consideration of the merits. This Court denied a petition for certiorari seeking review of that abstention ruling. *Grode v. USAA*, 479 U.S. 1031 (1987); App. at 67a.

On remand, USAA moved for summary judgment on federal constitutional grounds alone. The district court granted one of USAA's motions, ruling that Section 641 violates the dormant Commerce Clause.

On appeal to the Third Circuit, USAA briefed the state-law question. Brief of Appellees and Cross-Appellants, *USAA v. Foster*, Nos. 88-5077, 88-5078 and 88-5121 ("Brief of Appellees") at 18. USAA argued that its view "furnishes an additional reason, based solely on state law, to affirm the district court." *Id.* at 19. The court of appeals declined to address the state-law claim, noting uncertainty both as to its procedural status and factual basis. *USAA v. Foster*, App. at 17a n.11. Consequently, upon ruling the statute constitutional, the court of appeals "remand[ed] this matter to the district court for its determination of the viability of USAA's claim that the state statute is otherwise inapplicable to it." *Id.* at 40a.[4] The court stayed its mandate, upon the request

[4] This appeal was consolidated with an appeal by these Respondents of the decision in *Ford Motor Company, et al. v. Insurance Commissioner*, 672 F. Supp. 841 (E.D. Pa. 1987), *aff'd in part and rev'd in part*, 874 F.2d 926 (3d Cir. 1988). In the consolidated case,

of USAA, to allow USAA to file a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

No reason exists for this Court to grant plenary review of a decision that is interlocutory and merely represents application of this Court's dormant Commerce Clause jurisprudence.

First, consideration of the Commerce Clause issue by this Court is not now necessary. The Third Circuit has remanded for consideration of the viability of a state-law claim that, if resolved in USAA's favor, would end this litigation.

Second, the Third Circuit's interpretation of the dormant Commerce Clause represents an unremarkable application of this Court's precedent. The Third Circuit's ruling is entirely consistent with, and controlled by, this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117, *reh. denied sub nom. Shell Oil Co. v. Maryland*, 439 U.S. 884 (1978). Moreover, USAA—attempting to establish a theoretical conflict among the circuits—has failed to discover any lower court analysis that would require a different holding in this case.

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both the district court and the court of appeals ruled that because the Ford Motor Company ("Ford") subsidiary was acquiring a *failing* savings bank, federal law, 12 U.S.C.A. § 1730a(m) (Supp. 1987), expressly preempted the operation of Section 641 against Ford's insurance company affiliates. *USAA v. Foster*, App. at 23a. The Third Circuit held that the application of Section 641 to affiliates of a federally-chartered savings bank, including the USAA savings bank, is not otherwise preempted. *Id.* at 28a.

REASONS FOR DENYING THE WRIT

I. SUPREME COURT REVIEW AT THIS TIME WOULD BE INTERLOCUTORY AND INAPPROPRIATE IN LIGHT OF A REMAINING, POTENTIALLY DISPOSITIVE, STATE-LAW CLAIM

The petition fails to note the most salient fact concerning this case: That the Third Circuit did not order entry of final judgment but instead remanded for consideration of the viability of a claim concerning the meaning of Section 641, the scope of which has never been passed upon by a state or federal court. *USAA v. Foster*, App. at 40a.

If, as USAA requests, the district court rules Section 641 inapplicable because USAA is simply affiliated with a Texas savings bank that is not doing business in Pennsylvania, then USAA will be entitled to a final judgment (subject to appeal of the state-law issue). If, on the other hand, the lower court does not rule in its favor, then USAA will be entitled to seek redress in this Court from that final judgment. In either event, there is no reason for this Court to consider this case at this time.

Reluctance to review interlocutory decisions is a time-honored principle. Absent "extraordinary inconvenience and embarrassment in the conduct of the cause," this Court has traditionally declined to review decisions that do not finally resolve the litigation. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). Thus, in *Brotherhood of Locomotive Firemen v. Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967), this Court denied certiorari "because the Court of Appeals remanded the case, [which thus] is not yet ripe for review by this Court."

The pendency of the state-law claim does more than simply render the petition interlocutory. It also robs the petition of all its vitality. In support of its dormant

Commerce Clause claim, USAA assembles a parade of horrible occurrences that will assertedly arise from the Third Circuit's decision. But all of the horribles are premised on the belief—odd from USAA's view—that it is destined to lose the state-law claim. If it prevails in the lower courts, USAA could scarcely claim, for example, that "the Pennsylvania statute will have serious extraterritorial and protectionist consequences." Petition for a Writ of Certiorari ("Petition") at 22. If and when the statute is actually applied to USAA, this Court then will have ample opportunity to determine whether the real-life consequences and the constitutionality of Section 641 justify granting a petition for certiorari.

II. THE COURT OF APPEALS PROPERLY RULED THAT SECTION 641 IS CONSTITUTIONAL

A. The Third Circuit Correctly Applied This Court's Analysis In *Exxon Corp. v. Maryland* To The Facts Of This Case

The Third Circuit carefully reviewed and applied this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117, *reh. denied sub nom. Shell Oil Co. v. Maryland*, 439 U.S. 884 (1978), in concluding that Section 641 passes constitutional muster. That unexceptional application of controlling precedent presents no issue worthy of review in this Court.

Exxon concerned a state statute that barred all oil refiners—both in-state and out-of-state—from owning and operating a Maryland retail service station. Although the statute was facially neutral, there were "no local . . . refiners," 437 U.S. at 125, and so the burden of the state's regulation necessarily fell on out-of-state businesses.

But that disproportionate burden did not render the state law unconstitutional. Far from it, "[t]he fact that the burden of a state regulation falls on some interstate

companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.*, at 126. Rather, as this Court also explained, "the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Id.* Accordingly, the Court held that "[t]he absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce." *Id.*

The Third Circuit correctly recognized that the *Exxon* Court's reasoning precisely fits the facts of this case. In both cases, a state applied a non-affiliation requirement in a manner that permitted an out-of-state firm to choose between continuing an in-state activity or retaining an affiliation between two business enterprises. In both cases, the state law applied its non-affiliation requirement neutrally to both in-state and out-of-state businesses. In both *Exxon* and this case, the state law was ruled to be constitutional.

The Third Circuit's decision thus raises no new issues of constitutional law and conflicts with no precedents of this Court. Nor will there be disruption in the interstate market (even if, as USAA now apparently assumes, the state law applies). The Third Circuit explained that, as was true in *Exxon*, "[t]here is no reason for us to assume that USAA's . . . share of the insurance products sold in Pennsylvania will not be promptly replaced by other interstate insurers." *USAA v. Foster*, App. at 37a.[5]

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[5] USAA argues that *Exxon* should not control because "[t]he record in that case revealed that all gasoline ultimately came from out-of-state refiners, so that the exclusion of refiners from the business of retailing affected the particular parties making retail sales, but not the amount of gasoline moving in interstate commerce." Petition at 21. The Commerce Clause challenge in *Exxon*, however, protested "that the effect of the statute is to

B. The Principles Of *Exxon*, As Applied To The Facts Of This Case, Do Not Conflict With Other Decisions Of This Court.

1. *The Third Circuit applied appropriate Commerce Clause analysis.* USAA claims that the Third Circuit has held that no evenhanded statute can ever violate the Commerce Clause. Petition at 10-11 n.9. That is a mischaracterization of the Third Circuit's decision that studiously ignores the method of analysis actually employed by that court.

This Court has explained that when a statute "regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *see* Petition at 10. Both parts of that analysis have been satisfied.

First, Section 641 regulates in the public interest and was not motivated by any discriminatory purpose to disadvantage interstate commerce. The statute serves as a prophylactic measure designed (i) to protect customers from coercive tie-in arrangements, (ii) to guard against unfair anti-competitive activities aimed at non-affiliated insurance agencies and companies, and (iii) to preserve state enforcement resources by applying a simple bright-line standard. *See USAA v. Muir*, App. at 59a; *see also*

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protect in-state independent *dealers* from out-of-state competition." 437 U.S. at 125 (emphasis added). As in *Exxon*, where this Court explained that the loss of interstate, refiner-operated retailers could be replaced by interstate, independent retailers, the Third Circuit in this case explained that the loss of USAA, an interstate supplier of insurance, can easily be replaced by other interstate suppliers of insurance. USAA's contentions to the contrary, *see* Petition at 19-21, are largely based on extra-record predictions concerning the future plans of unidentified companies. Such speculation is worthy of no weight and is, in any event, irrelevant. "[I]nterstate independent dealers," *Exxon*, 437 U.S. at 126, are not affected in any way by Section 641.

n.2 *supra*. Those purposes are equally applicable to in-state and out-of-state institutions.[6]

In asserting now that Section 641 was motivated by a discriminatory, improper purpose, USAA tries to raise an issue not presented to the district court. The district court explained that "USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business." *USAA v. Foster*, App. at 57a n.6. Indeed, that court was careful to note that USAA "could not make such an argument because Section 641(b) treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania." *Id.* The Third Circuit similarly found the statute to "regulate[] indiscriminately." *USAA v. Foster*, App. at 30a. USAA has proffered no evidence sufficient to lead this Court to reject the factual findings of two courts.[7]

Second, the Third Circuit expressly applied the balancing test favored by USAA when it asked whether the burden imposed by Section 641 is " 'clearly excessive in relation to the putative local benefits.' " *Id.* at 32a (*quoting Pike v. Bruce Church Inc.*, 397 U.S.

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[6] USAA argues that these purposes could be served by a more narrow statute. But again, USAA ignores *Exxon*. The purpose of the Maryland law at issue in that case was to ensure that refiners that operated retail service stations did not have a competitive advantage over non-affiliated retailers. *Exxon*, 437 U.S. at 121. In place of a flat ban on affiliation, Maryland could have simply imposed a code of "fair dealing" to erase any competitive advantage. Like Pennsylvania, it did not do so. Like this Court's *Exxon* decision, the Third Circuit refused to use the Commerce Clause as a means to debate the wisdom—as opposed to the constitutionality—of state economic legislation.

[7] The 1985 testimony of an insurance administrator—made ten years after passage of Section 641—does not show discriminatory intent and is, in any event, insufficient. *See Maine v. Taylor*, 447 U.S. 131, 150 (1986).

137, 142 (1970)). It concluded that the statute had no discriminatory impact because, as *Exxon* demonstrates, the mere fact that out-of-state interests bear a disproportionate share of burden does not invalidate a statute, *id.* at 33a-34a; *see* text at 7-8 *supra*, and because "[n]othing in the records of the present cases, or in the decisions of the district courts . . . indicates that enforcement of § 641 will have the effect of favoring in-state interests over out-of-state interests." *USAA v. Foster*, App. at 38a n.19. To be sure, USAA takes issue with the Third Circuit's factual finding that out-of-state interests will not be disadvantaged. But that attack is primarily based on vague, extra-record predictions, *see* Petition at 20, that could never justify reversal of the Third Circuit's finding.

Indeed, the extent to which Section 641 will have an effect on insurance licensees is entirely within each licensee's control. The most that Section 641 requires is that all Pennsylvania licensees—in-state and out-of-state alike—will have the same choice: whether to choose continued eligibility for a Pennsylvania insurance license over the opportunity to expand their product lines into banking services. As the Third Circuit explained, such companies "cannot hope to invoke the Constitution at every turn to circumvent state regulation and insure unrestricted expansion and protection of their opportunity to obtain the greatest margin of profit." *USAA v. Foster*, App. at 36a. Companies like USAA would simply have to decide whether the expected profits from banking services will be greater or less than the loss of profits from insurance customers in Pennsylvania. That analysis, which is identical to the situation faced by out-of-state oil refiners in *Exxon*, constitutes mere business planning, not the deprivation of constitutional rights. And, of course, that choice is available equally to both out-of-state and in-state institutions. *See Central Mortgage Company v. Insurance Department*, 514 A.2d 956 (Commw. Ct. 1986),

aff'd 534 A.2d 759 (Pa. 1987) (ruling that an insurance agency could not continue to be licensed if acquired by a Pennsylvania lending institution because the in-state lending institution did not qualify for "grandfather" rights created by Section 641).

USAA argues that "[a]s a practical matter, many large interstate insurance companies cannot abandon their insurance activities in such a major market as Pennsylvania." Petition at 16. There is, however, no record evidence to support the view that large, unidentified insurance companies "cannot" come into compliance with Pennsylvania law if required to do so. Based on its speculation, USAA argues that this Court should enforce—as a matter of constitutional law—a national policy favoring financial integration. Petition at 18. Although phrased as a Commerce Clause issue, USAA is really arguing that a state should not be permitted to decide that its insurers must remain separate from banks. *Id.* As the Third Circuit observed, such assertions "are merely the preemption argument dressed in different clothing." *USAA v. Foster*, App. at 38a-39a n.20. The Third Circuit properly rejected USAA's claim that federal law preempts Section 641, *id.* at 28a, and USAA has chosen not to present that issue to this Court.

The governing method of analyzing Commerce Clause claims is thus clear. A nondiscriminatory statute violates the Commerce Clause "[o]nly if the burden on interstate commerce clearly outweighs the State's legitimate purposes . . . ." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (discussing *Exxon Corp. v. Maryland*); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 84 (1987) (contention that law "is discriminatory because it will apply most often to out-of-state entities" fails because "nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly-situated Indiana offerors"). The Third Circuit applied that analysis, and applied it correctly.

2. *The Third Circuit's analysis accords with this Court's Commerce Clause decisions.* Even putting *Exxon* to one side, the Third Circuit applied this Court's analysis in a manner wholly consistent with the line of Commerce Clause decisions that distinguishes between statutes posing permissible and impermissible obligations on interstate firms.

In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), this Court struck down an Illinois statute restricting the takeover of any corporation in which Illinois residents held more than 10% of the stock and which, therefore, could subject a single transaction to multiple, and possibly conflicting, state regulation. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court upheld a similar Indiana statute that applied only to corporations chartered in that state. The distinction was clearly expressed in the latter case: Because a corporation is chartered in only one state, the Indiana statute could not subject a corporation to inconsistent obligations in the same transaction and it did not, therefore, violate the Commerce Clause. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69.[8]

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[8] This distinction also explains why USAA is not advantaged by citing a series of circuit court opinions that review state anti-takeover laws that apply to non-resident corporations. *See Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 100 & n.1 (6th Cir. 1989) (state law applicable to corporations not chartered in the state); *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1427 (10th Cir. 1983) (same); *Martin Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982) (anti-takeover statute based on citizenship of shareholders); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1262-63 (5th Cir. 1978), *rev'd on other grounds*, 443 U.S. 173 (1979) (Idaho anti-takeover statute applied to Washington corporation); *see also Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 847-48 (1st Cir. 1989) (affirming issuance of a preliminary injunction where a state law imposing a one-year bar on an attempted takeover of a local corporation by a tender offeror that failed to abide by a disclosure requirement was "not likely" to be constitutional because of the stringency of penalty for non-disclosure).

The doctrine of *CTS Corp.* clearly applies here. Any limitation on the ability of USAA to sell insurance in Pennsylvania has absolutely no impact on its ability to sell insurance policies to persons located elsewhere. The Pennsylvania statute regulates only the sale of insurance policies to Pennsylvania citizens. No other state purports to have an interest in whether USAA, or any other company, is licensed to sell insurance in Pennsylvania. Nor does Section 641 affect the ability of other states to permit bank-insurance affiliations, if they so choose.

Moreover, Pennsylvania law does not impinge on USAA's pricing or sale of insurance in any other state. This narrow focus of Section 641 also distinguishes it from the type of regulation at issue in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), in which the Court struck down a New York law providing that "once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States." *Id.*, at 583; *see also Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2500 (1989) (invalidating a Connecticut law that effectively regulated the out-of-state prices of alcoholic beverages).

Section 641 simply follows the traditional rule that regulation of the business of insurance, like the regulation of corporate affairs recognized in *CTS Corp.*, is a matter of local interest. *See* 15 U.S.C. 1011 (McCarran-Ferguson Act) ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest"). Moreover, Section 641 reflects the same policy goals that have moved Congress to bar bank holding companies from engaging in general insurance activities. *See* Section 4(c)(8), Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)(8). Indeed, decisions about the permissibility of bank-insurance activities, al-

though subject to federal limitations as applied to certain federally-regulated institutions, have long been made at the state level as well. *See, e.g.*, Ariz Rev. Stat. Ann. § 6-465(A) (Supp. 1987) (restricting financial institution mergers with insurance businesses); Conn. Gen. Stat. Ann. § 38-72 (West 1986) (restricting the power of financial institutions and their affiliates to sell insurance); Va. Code Ann. § 38.2-205 (1986) (same). In other words, Section 641 is an unexceptional statute that deals with subjects of local concern and that is unquestionably constitutional.

3. *No conflict exists among the circuit courts of appeals.* USAA has found no circuit court decision rejecting the method by which the Third Circuit applied *Exxon* and weighed the impact of Section 641 on interstate commerce. Nor has USAA demonstrated that the Third Circuit's analysis expressly differs from the approach of any other circuit. Absent such a showing, USAA bears the heavy burden of demonstrating that the facts of this case would have been decided differently had they been presented to another circuit.

That USAA cannot accomplish. Instead, it relies on a series of anti-takeover cases, *see* n.8 *supra*, and two cases in which a court of appeals struck down local laws regulating sales of milk. But the anti-takeover cases and the milk cases merely illustrate the constitutional difficulty created when a single state imposes its requirements on multi-state transactions. *See Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303, 1309-11 (7th Cir.), *cert. denied*, 429 U.S. 1001 (1976) (regulation of the production of milk products sold multi-state); *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 631 F.2d 67, 69 (5th Cir. 1980), *summarily aff'd*, 454 U.S. 884 (1981) (same). That principle, as noted above, has no relation to Section 641, which does not impair the ability of USAA to sell insurance in any other state. Moreover, the fact-based inquiries conducted in other cases, *see, e.g.*,

Dixie Dairy Co. v. City of Chicago, 538 F.2d at 1309, 1311 (court need not give "deference to a legislative judgment which is concededly without a substantial basis in fact") do not, in any way, implicate the validity of the factual analysis made by the Third Circuit on the facts of this case.[9]

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[9] We agree with USAA (although for different reasons), that this Court should not hold this case pending the outcome of *Lewis v. Continental Bank Corporation, prob. juris. noted*, 109 S.Ct. 2446 (1989). *See* Petition at 23 n.23. In *Lewis*, Florida enacted a statute that even-handedly prohibited anyone from establishing an industrial savings bank in Florida. The avowed purpose of this statute was to effectuate the promise of federal law—the Douglas Amendment, 12 U.S.C. § 1842(d)—which, at that time, authorized states to prevent interstate banking by preventing out-of-state bank holding companies from affiliating with in-state banks. Because Florida had used this law to forbid most out-of-state bank holding companies to collect deposits in Florida, the effect of Florida's statute was to prevent only out-of-state bank holding companies from obtaining access to the savings of Florida residents. The Eleventh Circuit ruled that Florida had purposefully discriminated against out-of-state businesses in violation of the Commerce Clause. After this ruling, but before reconsideration, Congress expanded the Douglas Amendment, so that it authorized states to forbid out-of-state bank holding companies to acquire, *inter alia*, industrial savings banks. The Eleventh Circuit, on reconsideration, ruled that this amendment did not moot the challenge.

The issues in *Lewis* differ markedly from those in *USAA v. Foster*. The Commerce Clause issue in *Lewis* demands resolution of the interplay between federal law, which authorizes states to purposefully discriminate against interstate banking, and the Commerce Clause. *Lewis* also presents an issue of square conflict in the courts; whether attorneys fees are available under 42 U.S.C. § 1988 for a Section 1983, 42 U.S.C. § 1983, suit that successfully asserts Commerce Clause challenges. The issue of attorneys fees has not been raised or addressed in the *USAA* case. And finally, *Lewis* apparently involves a moot dispute. As the Solicitor General concluded in its brief to this Court in *Lewis*, reversal of the Eleventh Circuit is necessary because Congress' expansion of the Douglas Amend-

CONCLUSION

For the foregoing reasons, this Court should deny USAA's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

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ment to allow states to forbid interstate acquisitions of industrial savings banks moots that case and requires that the Florida statute be reaffirmed.